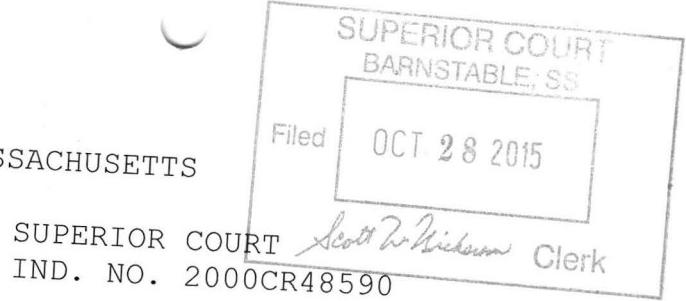


COMMONWEALTH OF MASSACHUSETTS
BARNSTABLE, ss



COMMONWEALTH) COMMONWEALTH'S OPPOSITION TO
v) THE DEFENDANT'S MOTION TO PRECLUDE
CHARLES ROBINSON) ANY MEDICAL AND/OR PSYCHOLOGICAL
) EVALUATION BY THE COMMONWEALTH

Now comes the Commonwealth through its District Attorney Michael D. O'Keefe and respectfully opposes the defendant's Motion to Preclude any Medical and/or Psychological Evaluation by the Commonwealth. As reasons therefore, the Commonwealth submits that the defendant has not yet fully complied with discovery by supplying the Commonwealth with test results from its expert, Dr. Ebert. Without this information, which was requested in February, 2015, in April-May, 2015, and again in October, 2015, the Commonwealth's expert cannot prepare properly for an examination of the defendant in this matter.

ARGUMENT

THE DEFENDANT IS NOT ENTITLED TO RELIEF BECAUSE HE IS RESPONSIBLE FOR THE DELAY. IN ADDITION, THE DEFENDANT HAS NOT SHOWN ANY PREJUDICE.

A. Prior proceedings

The defendant found guilty of first degree murder and assault and battery with a dangerous weapon on August, 21,

2000 (A/2). On the murder conviction, the defendant was sentenced to life without the possibility of parole (A/7). The defendant's appeal was entered in the Supreme Judicial Court on December 4, 2000 (B/1). Attorney Krowski entered his appearance in this case on February 7, 2001 (A/8).

On December 3, 2001, the defendant's Motion for a New Trial and Motion for Funds for Employment of a Psychiatrist were remanded to the Superior Court for resolution (B/2). The Motion for a New Trial and Motion for Funds for Employment of a Psychiatrist were docketed in the Superior Court on December 5, 2001 (A/8). On August 13, 2001, the defendant was granted a stay of his appeal in the Supreme Judicial Court in order to pursue a motion for a new trial (B/2).

The case was continued several times until April 16, 2004, when the Superior Court began to hear testimony on the Defendant's Motion for a New Trial (A/8-10) (Nickerson, J.). Further hearing on the defendant's Motion for New Trial took place on April 26, 2004 (A/10). The hearing on the Motion for A New Trial was continued until June 14, 2004 (A/10). A petition for habeas corpus for June 15, 2004 was cancelled, and on that date the motion judge (Nickerson) ordered that the defendant be examined pursuant to G.L. c. 123, §15a (A/10).

On June 16, 2004, after a competency hearing, the defendant was committed for observation (A/11). On September 29, 2004, the defendant was ordered committed pursuant G.L. c. 123, §18, for six months (A/12). On March 23, 2005, the defendant was ordered committed for a period not to exceed one year (A/13).

On July 30, 2009, the hearing judge in the defendant's first Motion for A New Trial ordered that the defendant file a renewed motion for a new trial (A/15). On March 16, 2011, the motion judge ordered that the motion for a new trial commence anew, and that the defendant must file an amended motion for a new trial that clearly sets forth the actual and legal bases for relief, accompanied by an affidavit from a mental health professional or the affidavit of counsel with a detailed clinical report of an appropriate mental health professional (A/16).

Beginning in October, 2001, and continuing through the years, the defendant repeatedly filed for funds for his expert witness, Dr. Rosmarin (A/8, 10, 14). On June 2, 2014, the defendant filed his Amended Motion for A New Trial (A/17). On June 6, 2011, the defendant filed an *ex parte* motion for funds to retain a new psychologist (A/16-17). On June 10, 2013, the defendant filed an *ex parte* motion for funds to retain a new psychologist to support

the amended motion for a new trial (A/17). On June 10, 2014, the defendant filed another *ex parte* motion for funds to retain a new psychologist (A/17).

On August 8, 2014, the Commonwealth filed a motion for examination of the defendant by Dr. Kelly (A/17). This motion was allowed by the motion judge on October 3, 2014 (A/18).

On February 25, 2015, the Commonwealth acknowledged in a letter that it agreed to reciprocal discovery with the defendant as to data and material relied upon by the expert witnesses in this case ("C"). The defendant specifically agreed to provide the Commonwealth with all materials relied upon by Dr. Ebert in forming his opinion ("C"). On March 9, 2015, the Commonwealth was granted access to the defendant's records at Bridgewater State Hospital (A/18).

In April-May, 2015, the Commonwealth, in speaking on the telephone with Attorney Krowski's associate, Attorney Jason Howard, requested that the Commonwealth be given the raw data and computer-generated report of the Personality Assessment Inventory ("PAI") conducted by Dr. Ebert on the defendant ("D", "E"). After the defendant filed his motion to preclude the Commonwealth from examining the defendant, the Commonwealth reached out to Dr. Kelly ("E"). After speaking with Dr. Kelly, on October 16, 2015, the

Commonwealth again reached out to Attorney Krowski's office, and again requested the "PAI" raw data and computer-generated report ("E"). As of the date of this filing, the Commonwealth has not heard back from Attorney Krowski as to the status or availability of this "PAI" data and report ("E"). Doctor Kelly has indicated that once he has this information, he will be prepared to examine the defendant within two or three weeks of its receipt ("D").

- B. The defendant has been responsible for the delay in this case. He has created the delay, therefore he cannot be allowed to claim that the Commonwealth is responsible for the delay in this case and should be sanctioned.

The Commonwealth is entitled to have the defendant examined by an expert of its choosing. *Seng v Commonwealth*, 445 Mass. 536, 541 (2005).

The defendant has been responsible for the delay in this case for over more than 13 years with the filing of two motions for a new trial, each with different expert witnesses. The Commonwealth has been waiting for the receipt of the "PAI" raw data and computer-generated report since April-May, 2015.

The doctrine of forfeiture by wrongdoing has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong. *Commonwealth v Szerlong*, 457 Mass. 858, 860-861 (2010), quoting *Reynolds v United*

States, 98 U.S. 145, 159 (1878). Because the defendant has created the delay in this case, he cannot be allowed to benefit from it. The Commonwealth is still waiting for psychological data and testing that it requested in April-May, 2015.

C. The defendant has not alleged, let alone shown, any prejudice from this delay he has created.

The defendant cites the doctrine of *laches* in support of his argument. The doctrine of *laches* is an equitable remedy involving failure to timely assert legal remedies. Even assuming that the doctrine applies in a criminal case, which the Commonwealth does not concede, the defendant has not met one of the elements of *laches*, namely showing prejudice by the delay.

The defendant claims that the Commonwealth has violated the time limits established by G.L. c. 123, §15. However, the defendant is not committed to Bridgewater State Hospital pursuant to that statute. The time constraints in G.L. c. 123, §15 pertain to a patient's liberty interest. Here there is no liberty interest violation, because the defendant is serving a sentence of life without the possibility of parole based upon his first-degree murder conviction.

Establishing a valid *laches* defense is not sustained by showing mere delay that does not work some form of prejudice or harm to a defendant. *Jubinville v Jubinville*, 313 Mass. 103, 105 (1943). The defendant in this case does not allege any specific prejudice in his motion, therefore, even if the legal principle were to apply, the defendant has not met his burden of showing that he was prejudiced. He is not entitled to relief.

The case of *Commonwealth v Swenson*, 368 Mass. 268 (1975) is inapplicable to this present situation. *Swenson*, which involved a delay in the docketing of a defendant's appeal, is inapplicable both factually and in legal principle. In addition, even if it were to apply, which the Commonwealth does not concede, *Swenson* also requires that a defendant show prejudice before he may be entitled to any sort of relief. *Id.* at 279.

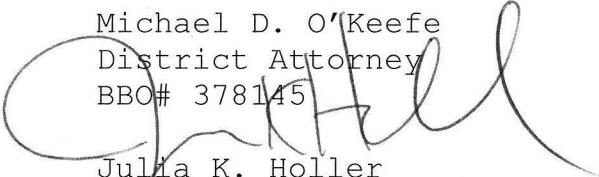
The relief requested in this case is perhaps better explained by defense counsel's unhappiness with the Commonwealth's choice of Dr. Kelly as its expert. Defense counsel "vehemently oppose[d]" Dr. Kelly as the Commonwealth's expert in this matter ("F").

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court deny the relief requested.

Respectfully submitted,

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